85-1702

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT REQUIRED BY RULE 28.1

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Norfolk and Western Railway Company:

Norfolk Southern Corporation
Des Moines Union Railway Company
Fort Wayne Union Railway Company
High Point, Thomasville & Denton Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company
Winston-Salem Southbound Railway Company
Algers, Winslow and Western Railway Company
Augusta and Summerville Rail Road Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina and Midland Railroad Company
The South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

QUESTION PRESENTED

Whether the court of appeals erred in holding that a claim solely for emotional injuries is actionable under the Federal Employers' Liability Act, 45 U.S.C. § 51, where assault and battery are alleged, but where the alleged sources of the emotional injuries were workplace disputes with supervisors subject to mandatory grievance procedures that had been initiated by the employee pursuant to the Railway Labor Act, 45 U.S.C. § 151.

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IN THE

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OCTOBER TERM, 1985

No. ———

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Norfolk and Western Railway Company ("N&W") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-28a) is reported at 773 F.2d 807 (1985). The judgment of the district court against Petitioner entered upon a jury's verdict is attached in the Appendix (*infra*, 29a-30a). The order of the district court (App., *infra*, 31a-32a), denying Petitioner's motions for post-trial relief, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1985. The order of the court of appeals denying N&W's petition for rehearing with suggestion for rehearing *en banc* was entered on November 18, 1985 (App., *infra*, 33a). On February 7, 1986, Justice Stevens extended the time for filing for a writ of certiorari to and including April 17, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title I, Section 2 of the Railway Labor Act ("RLA"), 45 U.S.C. § 151a, provides in pertinent part:

> The purposes of the Act are (1) to avoid any interruption to Commerce or to the operation of any carrier engaged therein . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

Title I, Section 2 of the RLA, 45 U.S.C. § 152, provides in pertinent part:

> *First. Duty of carriers and employees to settle disputes.* It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> *Second. Consideration of disputes by representatives.* All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided with all expedition, in conference between representatives designated and authorized so

> to confer, respectively by the carrier or carriers and by the employees thereof interested in the disputes.[1]

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

STATEMENT

1. Petitioner, N&W, a subsidiary of Norfolk Southern Corporation, is a common carrier by rail operating in the eastern and mid-western United States. At all times relevant to this action, Respondent, Gary C. Lancaster, worked in N&W's locomotive and truck shops in Decatur, Illinois. The employees in those shops, including Respondent, are represented by trade unions that are signatories to collective bargaining agreements with N&W. The work performed within the shops is undertaken in accordance with the terms of those agreements, and the conditions of employment for those employees are covered by those agreements.

Respondent's complaint concerns several episodes involving Respondent and his supervisors between 1975 and 1979. The first of these incidents occurred in November 1975, when Respondent's foreman, Marshall Lachrone, became angry at Respondent and several other workers who Mr. Lachrone thought were shirking their duties

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[1] The text of 45 U.S.C. § 153(i) First, setting forth the procedures applicable to resolution of grievances under the RLA, is provided in the Appendix, *infra*, 34a.

(App., *infra*, 2a). After flipping over a table upon which one of Respondent's co-workers was sleeping, and smashing a bench, Mr. Lachrone grabbed a broom handle and shook it at Respondent for approximately ten to fifteen seconds while reprimanding him (*id.*). Respondent bid out from Mr. Lachrone's supervision and complained about the incident to his union (*id.*). No action was taken, however, and Respondent pursued his contractual grievance arbitration remedies no further (*id.*).

The incident upset Respondent abnormally (App., *infra*, 2a). He thought people were following him, thought his phone was tapped, felt that the pressures of working for the railroad were too much and went to Georgia to look for a new job (*id.*). After a couple of months, however, Respondent's distress subsided, and he returned to work for Petitioner under the supervision of another foreman, George Funderburk (*id.*).

According to Respondent, Mr. Funderburk had a habit of "goofing off" in the form of grabbing and punching Respondent over the latter's protest (*id.*). This behavior culminated in December of 1976, when Mr. Funderburk twice thrust his hand down the back of Respondent's pants, once squeezing a buttock, the other time sticking his finger into Respondent's anus (*id.*). Respondent complained to his union about the incident involving Mr. Funderburk, but again did not pursue his grievance/arbitration remedies any further.

Following this incident involving Mr. Funderburk, Respondent became very upset, had trouble working, consulted a doctor, and, on the doctor's advice, took a leave of absence (*id.*). The doctor diagnosed Respondent as suffering from anxiety (*id.*).

Respondent worked uneventfully from 1977 until May 1979, when a third episode occurred involving his foreman, Jim Boyd. Respondent and another worker were repairing a locomotive under Mr. Boyd's supervision

when the foreman swung a sledgehammer at a steel pin that was lodged in the brake rigging of the locomotive (App., *infra*, 2a-3a). The sledgehammer flew out of Mr. Boyd's hands and slid under the locomotive striking Respondent in the leg (*id.* at 3a). Respondent, believing Mr. Boyd had thrown the sledgehammer at him, complained to his union representative about the incident.

Two months later, Respondent was working for yet another foreman, Jack Tynan, when another incident occurred (App., *infra*, 3a). Mr. Tynan, who was seated at the desk in his office holding a pickax handle, told Respondent that if he did not do his job he would put Respondent's name on the handle along with those of other workers (*id.*). About a week later, Respondent delivered a packet of dispatch papers to Mr. Tynan's office (*id.*). The papers were folded, and Mr. Tynan told Respondent that the papers were not supposed to be folded (*id.*). Respondent replied that he had not folded them and that they had been folded when he received them for delivery (*id.*). Mr. Tynan became angry at that point and, with the pickaxe handle in hand, began to approach Respondent, eventually striking the handle against the door frame by which Respondent was standing (*id.*). In August 1979, Respondent approached the chairman of his union grievance committee with two formal complaints about his foreman, Mr. Tynan. After investigating Respondent's complaints, the chairman of the grievance committee informed Respondent that the witness identified by Respondent could not confirm Respondent's charges. Neither Respondent nor the union pursued these grievances any further.

Following the episode involving Mr. Tynan, Respondent was diagnosed as schizophrenic (App., *infra*, 3a). Respondent quit work in mid-1979, resumed work with Petitioner between December 1979 and December 1980, and has not worked since that time.

2. Respondent filed this action on May 17, 1982, under the FELA, 45 U.S.C. § 51, alleging that by reason of the conduct of foreman Tynan, Petitioner failed to provide a reasonably safe place to work and thereby caused Respondent mental and emotional injury. On November 14, 1983, Respondent filed a motion for leave to file an amended complaint adding the episodes involving the other foremen described above.

The case was tried before a jury in January 1984. On January 31, 1984, the jury returned a verdict in favor of Respondent and assessed damages against Petitioner in the total sum of $850,000. On the same date the clerk of the court entered judgment on that verdict (App., *infra*, 29a-30a).

Following the entry of judgment, Petitioner filed a post-trial motion challenging, *inter alia*, the subject matter jurisdiction of the district court. Petitioner contended that each of the acts complained of by Respondent constituted a dispute subject to the mandatory grievance procedures set forth under the RLA, 45 U.S.C. § 151, *et seq.* On October 14, 1984, the district court entered an order (App., *infra*, 31a-32a) denying Petitioner's post-trial motions.

3. The court of appeals affirmed (App., *infra*, 1a-28a), focusing much of its opinion on the issue raised here—the interplay between the FELA and the RLA. In attempting to draw a line between torts actionable in court under the FELA and employment disputes actionable solely under RLA grievance procedures, the court of appeals identified three categories of cases.

The first category includes those cases in which a classic "unauthorized touching" of plaintiff's person takes place (such as a supervisor negligently dropping a brick on an employee's foot) and in which there is no possible issue concerning the meaning or application of the collective bargaining agreement (App., *infra*, 8a-9a). The

court held that claims in this category may plainly be brought under the FELA (*id.*).

The second category includes those cases which involve classic labor disputes (such as whether an employee had been paid the wage fixed under the collective bargaining agreement) (App., *infra*, 10a). The court of appeals held that, regardless of how an employee characterizes such a dispute, it is one which "Congress would have wanted . . . resolved by the arbitrators [under the RLA] and not by a state or federal court [under the FELA]" (*id.*).

The third category involves those cases falling in between the first two—a category in which a potential conflict between the FELA and RLA exists, *i.e.*, those cases where a "traditional physical tort" is alleged to have occurred in the context of a labor dispute between an employee and his supervisor. This case falls in the third category.

The court acknowledged that the incidents involving supervisors Lachrone and Tynan "arose from an employment dispute, for these supervisors were expressing their dissatisfaction with Lancaster's performance of his job" (App., *infra*, 12a). The court further acknowledged that grievances under the RLA could properly have been brought with respect to *all* of the episodes and that there were remedies under the RLA for all the incidents (*id.*). Nonetheless, the court found "that the critical question in this case is simply whether Lancaster has stated a claim for violation of one of the traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury, all of which are torts actionable under the [FELA]" (App., *infra*, 11a). Finding that Respondent's allegations did constitute traditional tort claims and that the employment context was "incidental" to those allegations, the court of appeals held that Respondent was not limited to his remedies under the

RLA, and, indeed, was not even bound to exhaust his remedies under the RLA before litigating his claims under the FELA (App., *infra*, 12a-14a).

REASONS FOR GRANTING THE PETITION

This case raises an important issue concerning the interplay between the RLA, 45 U.S.C. § 151 *et seq.*, and the FELA, 45 U.S.C. § 51 *et seq.* More specifically, it concerns the ability of a railway employee, who has suffered purely emotional injury as a result of misconduct of his supervisors, to avoid the exclusive mandatory arbitration requirements of the RLA and, instead, to file a claim for damages under the FELA. This issue, which affects railroad employers and employees throughout the country, is arising with increasing frequency and has resulted in several recent inconsistent decisions by the courts of appeals—two of which are presently pending before the Court on petitions for writs of certiorari.

In *Adkins* v. *Chesapeake and Ohio Railway Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished order), *petition for cert. pending*, No. 85-1099, and *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir. Aug. 30, 1984) (unpublished order), the courts held that claims for mental or emotional distress arising from workplace disputes are directly related to the employer-employee relationship and thus must be resolved pursuant to the grievance procedures required by the RLA.[2] By contrast, in *Buell* v. *Atchison, Topeka and Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), *petition for cert. pending*, No. 85-1140, the court held that a claim

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[2] Similarly, in two other recent cases, the courts held that the FELA does not create a cause of action for retaliatory discharge and that the exclusive remedy for such a claim lies in the RLA-mandated grievance procedures. *Lanfried* v. *Terminal R. Ass'n of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

for emotional distress was actionable under the FELA, even where the alleged source of such injuries was a workplace dispute subject to mandatory grievance procedures that had been initiated pursuant to the RLA.[3]

This case is different from *Buell*, *Adkins*, and *Antalek* in that here the railway employee has alleged traditional torts, assault and battery.[4] Unlike *Buell* and *Adkins*, therefore, this case cannot be resolved by holding that there is no tension between the two acts because only one, the RLA, is applicable. In this case, the issue of the proper relationship between the two statutes—where both arguably apply—must be decided. It is an important issue, involving the two primary laws that govern employment relationships in one of this nation's most important industries. The decision of the Seventh Circuit conflicts in principle with the decisions of this Court and those of the courts of appeals for several circuits, which have made it clear that Congress intended the grievance provisions of the RLA to be interpreted broadly in order to facilitate the "prompt and orderly settlement of *all* disputes growing out of grievances" (emphasis supplied) in the railroad industry.

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[3] This same issue is now also being considered by the First Circuit in *Moody* v. *Maine Central Railroad Co.*, No. 85-1960. Like *Adkins*, *Antalek* and *Buell*, the *Moody* case involves an FELA suit by a railroad employee claiming emotional injury as a result of alleged harassment by the plaintiff's supervisor. The district court dismissed the complaint, holding that the claims therein did not state a claim under the FELA, Civil No. 84-0415-P (D. Me. Nov. 6, 1985). The case has been fully briefed in the First Circuit. The appellant Moody's brief relies principally on the Ninth Circuit's holding in *Buell*, whereas the appellee railroad relies on *Adkins*, *Antalek* and the district court decision in *Buell*. The appellee in *Moody* argues that the court of appeals' decision in *Buell* is wrong.

[4] With the exception of the alleged assault involving foreman Tynan in 1979, the other claims alleged by Respondent were at least arguably barred by the three-year statute of limitations applicable to FELA claims (App., *infra*, 24a-25a).

In the event the Court grants certiorari in *Buell*, it should either review this case as well, or hold it pending a decision in *Buell*. In our view, the Court should grant the petitions in both cases. The issues are not the same, and, while the *Buell/Adkins/Antalek* fact pattern (workplace dispute with no traditional tort) appears to be more common, the objectives of the RLA cannot be achieved until the *Lancaster* issue is also resolved.

Railroad employee disputes are governed by the RLA, 45 U.S.C. § 151 *et seq.* The Act states that one of its general purposes is "to provide for the prompt and orderly settlement of all disputes growing out of the grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. 45 U.S.C. § 151a(5). A so-called "minor dispute" is one which involves either the meaning or application of the collective bargaining agreement or an employment dispute not covered by the agreement. *Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945).[5] The fact that they are labelled "minor" disputes does not mean they are unimportant. Rather, "minor disputes" cover the broad range of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

This Court has made clear that, consistent with the RLA, 45 U.S.C. § 153(i) First, minor disputes must be

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[5] As this Court explained in *Burley*, *supra*, 325 U.S. at 723, the RLA divides labor disputes into two categories: the first, "major disputes," relates to "the formation of collective agreements or efforts to secure them," and the second, "minor disputes," relates to the interpretation of a collective bargaining agreement or disputes "founded upon some incident of the employment relation." Under the RLA, major disputes are subject to the exclusive jurisdiction of the National Mediation Board (45 U.S.C. § 154), while minor disputes are subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") (45 U.S.C. § 153). *Id.* at 722.

submitted to the NRAB, which has exclusive jurisdiction to resolve them. *Andrews* v. *Louisville & N.R. Co.*, 406 U.S. 320, 322, 325 (1972). As this Court stated in *Locomotive Engnrs.* v. *Louisville & N.R. Co.*, 373 U.S. 33, 38-39 (1963), the grievance procedures provided under the RLA constitute "a mandatory, exclusive, and comprehensive system for resolving grievance disputes . . . [and were] intended by Congress to be the complete and final means for settling minor disputes." *See also Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94.

Congress has also made clear that the scope of RLA is not to be interpreted narrowly. "The purpose of the RLA," Congress declared, is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (emphasis supplied). 45 U.S.C. § 151a(5).[6] Consistent with Congress' mandate, courts have liberally construed the RLA's coverage. Thus, this Court has held that "disputes" under the RLA include "claim[s] . . . founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." *Elgin, J. & E.R. Co.* v. *Burley*, *supra*, 325 U.S. at 723.

The Seventh Circuit's decision in this case is expressly premised on the theory that Congress did not mean what it said in drafting the RLA and that this Court erred in interpreting the Act in *Burley* (App., *infra*, 9a-10a). Contrary to the plain language of the statute and this Court's decision, the Seventh Circuit held that the scope of the grievance procedures mandated by the RLA is strictly limited to controversies concerning the interpretation of collective bargaining agreements (*id.*).

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[6] This language is repeated in 45 U.S.C. § 153(i) First (App., *infra*, 34a).

By contrast, other federal courts—faithful to the mandate to interpret the scope of the RLA broadly—have held that railroad employee claims of intentional infliction of emotional distress,[7] retaliatory discharge,[8] and slander[9] all constitute disputes subject to RLA grievance procedures. These holdings have included claims filed under the FELA.[10] The courts of appeals for several circuits have held that railway labor disputes that are "inextricably intertwined with the grievance machinery of the collective bargaining agreement" or are "arguably governed" by the collective bargaining agreement or which have a "not obviously insubstantial" relationship to it are disputes subject to RLA grievance procedures.[11]

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[7] *See, e.g., Adkins* v. *Chesapeake & O.R. Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985); *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984); *Choate* v. *Louisville & N.R. Co.*, 715 F.2d 369 (7th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

[8] *See, e.g., Minehart* v. *Louisville & N.R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal R. Ass'n of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

[9] *See, e.g., Evans* v. *Missouri Pacific R. Co.*, 618 F. Supp. 930 (E.D. Mo. 1985); *Fraley* v. *Hayes*, 112 BNA LRRM 2298 (S.D. Ill. 1982); *Carson* v. *Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979).

[10] *See, e.g., Adkins* v. *Chesapeake & O. Ry. Co., supra*; *Antalek* v. *Norfolk and Western Ry. Co., supra*; *Landfried* v. *Terminal R. Ass'n of St. Louis, supra*; *Jackson* v. *Consolidated Rail Corp., supra*; *Sharkey* v. *Penn Central Transport. Co.*, 493 F.2d 685, 688 (2d Cir. 1974); *Beanland* v. *Chicago, Rock Island & Pac. R.*, 480 F.2d 109, 113 (8th Cir. 1973).

[11] *See, e.g., Antalek* v. *Norfolk and Western Ry. Co., supra* (inextricably intertwined); *United Transp. Union* v. *Penn Central Transp. Co.*, 505 F.2d 542, 544-45 (3d Cir. 1974) (not obviously insubstantial); *Local 1477, United Transp. Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973) (arguably); *Railway Express Agency* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 459 F.2d

Read collectively, these cases make clear that it is the *source* of a railroad employee's alleged injury, and not the remedy which he might prefer to pursue, that determines whether a dispute is subject to the RLA.

The overly-narrow interpretation of the RLA applied by the court of appeals in this case—which permits a plaintiff to evade the grievance procedures mandated by that Act simply by alleging a "traditional tort"—conflicts in principle with these decisions as well as with congressional railway labor policy. This reason alone warrants that this Court review the Seventh Circuit's decision or hold this case pending a decision in *Buell* and/or *Adkins*.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case should be granted. Alternatively, if the Court grants the petition for certiorari in *The Atchison Topeka and Santa Fe Railway Company* v. *Buell*, No. 85-1140, it may wish to consider retaining this case on its docket pending decision on the merits in No. 85-1140.

Respectfully submitted,

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226, 231 (5th Cir. 1972) (arguably); *Airline Stewards & Stewardesses Ass'n* v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289, 291 (1st Cir. 1969) (not obviously insubstantial); *Southern R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967) (not obviously insubstantial).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 84-2768

GARY C. LANCASTER,
Plaintiff-Appellee,
v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant-Appellant.

Argued May 28, 1985

Decided Sept. 16, 1985

As Amended Sept. 17, 1985

James P. Baker, Law Office of James P. Baker, Springfield, Ill., for defendant-appellant.

Ronald L. Carpel, Frank H. Byers, Byers, Byers & Greenleaf, Decatur, Ill., for plaintiff-appellee.

Before CUDAHY and POSNER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

POSNER, Circuit Judge.

This appeal by the Norfolk and Western from a judgment for $850,000 in a suit under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) by a former employee of the railroad, Gary Lancaster, presents issues of labor and tort law in a bizarre factual setting.

The jury could have found the following facts in favor of Lancaster. In 1975 he was a 30-year-old mechanic working in the railroad's locomotive shop in Decatur, Illinois. Lachrone, a short-tempered foreman in the shop who had once been disciplined for roughing up a worker, became angry at Lancaster and several other workers who Lachrone thought were soldiering on the job. After flipping over a table on which one of the workers (not Lancaster) was sleeping, and smashing a bench, Lachrone grabbed a broom handle, approached Lancaster in a menacing fashion, screamed at him for about 15 seconds, and shook the broomstick in his face. Lancaster bid out from Lachrone's supervision and complained about the incident to his union, but no action was taken.

The incident upset Lancaster abnormally. He thought people were following him, thought his phone was tapped, felt that the pressures of working for the railroad were too much, and went to Georgia to look for a new job. But after a couple of months his distress subsided and he went back to the old one. He was assigned to another foreman, Funderburk, who liked to "goose" workers, pull their hair, and hit them on the arms. He did these things to Lancaster, over the latter's protest. This behavior culminated in an incident in 1976 when Funderburk twice stuck his hand down the back of Lancaster's pants —once squeezing a buttock, the other time sticking his finger into Lancaster's anus. Lancaster became very upset, had trouble working, consulted a doctor, and on the doctor's advice took a leave of absence. The doctor diagnosed Lancaster as suffering from anxiety but it is unclear whether he told Lancaster his diagnosis.

Lancaster returned to work early in 1977 and worked uneventfully until an incident in 1979 involving another supervisor, Boyd. Lancaster and another worker were repairing a locomotive under Boyd's supervision when Boyd picked up a sledgehammer—though as a supervisor

he was not supposed to wield a sledgehammer—and swung it at a pin that was stuck. The sledgehammer flew out of Boyd's hands when he completed his swing, and struck Lancaster. Although only bruised, Lancaster became very upset because he thought Boyd had thrown the sledgehammer at him ("I swear before God the man throwed that sledgehammer, because when he throwed it, it went right where my head was back, and when I moved back is the only thing that saved my life").

Two months later Lancaster found himself working under another hot-tempered supervisor, like Lachrone—Tynan, a burly six-footer, who while fondling a pickax handle told Lancaster that if he didn't "keep on the job and do it right, I'll put your name on it." About a week later Lancaster happened to deliver some papers to Tynan that were folded. Tynan said, "I told you not to fold the papers," to which Lancaster replied that he had not folded them, they had been folded when he had received them to give to Tynan. Tynan, enraged, charged Lancaster with pickax handle in hand ("I turned around, and here's Jack [Tynan] coming at me, and I says, don't Jack, don't") and struck the door frame over Lancaster's head with the handle ("I heard his pickax handle hit the door frame, and I turned around, and there's Jack, and he wasn't smiling"). Lancaster became even more upset than after the previous incidents. Indeed his mental condition deteriorated rapidly. His doctor referred him to a psychiatrist who, two weeks after the incident with Tynan, diagnosed Lancaster as schizophrenic. Lancaster quit work, tried unsuccessfully to return, and is not expected never (sic) to be well enough to work again.

A psychologist who testified for the railroad opined that Lancaster's latent schizophrenia would surely have been triggered by some other traumatic event if no supervisor misconduct had occured. The two psychiatrists who testified for Lancaster thought this unlikely, among other reasons because Lancaster had got through

two divorces before 1970 without incident. They thought that Lancaster's sense of self-worth was bound up with his work for the railroad and that his supervisors' hostile acts had exerted unbearable psychological pressure on him. All three expert witnesses agreed that the incident with Tynan, coming on top of the earlier incidents, had precipitated a descent into madness from which Lancaster will never recover.

Surprisingly, the railroad does not dispute the reasonableness of the damage award (which is made up of $40,000 in medical expenses, $200,000 in past and future pain and suffering, and $610,000 in lost earnings), although it does challenge one of the instructions on damages. Before getting to that, however, we shall consider the three grounds on which the railroad asks that the suit be dismissed: that the cause of action is barred by federal labor law; that the supervisors' misconduct was outside of the scope of their employment, so that the railroad is not liable for that misconduct under the doctrine of respondeat superior; and that the statute of limitations has run. The railroad's challenge to the instruction on respondeat superior (as distinct from the factual basis for a finding of liability on a theory of respondeat superior) has no possible merit and therefore need not be discussed.

The railroad's first ground requires us to consider the effect, if any, of the Railway Labor Act on the plaintiff's rights under the Federal Employers' Liability Act. Originally enacted in 1906, the FELA creates a tort remedy for railroad workers injured on the job. Many years later Congress passed the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, which subjects disputes arising under collective bargaining agreements in the railroad industry (and, with some alterations, now in the airline industry as well, see 45 U.S.C. §§ 181-88) to compulsory arbitration. See, e.g., *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 34-35, 77

S.Ct. 635, 637-638, 1 L.Ed.2d 622 (1957); *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914 (7th Cir. 1985). If Lancaster's dispute with the Norfolk and Western is a dispute over the meaning or application of the collective bargaining agreement—a "grievance," in the jargon of labor relations—then he has a remedy under the Railway Labor Act (or rather had one, because the time limits on prosecuting a grievance under the railroad's collective bargaining agreement with Lancaster's union—limits that are usually stated in days—have surely run out by now). That remedy is to file a grievance against the railroad, the first stage in invoking the arbitral remedies provided by the Act. Lancaster's only judicial remedy under the Act, however, should he lose the arbitration, would be the extremely limited judicial review—a misnomer perhaps, see *id.*, at 921—that the Railway Labor Act allows of arbitration awards.

Does that Act displace the Federal Employers' Liability Act for all harms arising from conduct that might violate a collective bargaining agreement (in an industry subject to the Act) and might thus be arbitrable? There is a mountain of cases dealing with the preemption of state tort remedies by the Railway Labor Act, but oddly enough we have found only one case dealing with the Act's displacement of tort remedies under the FELA (the *Yawn* case, discussed below), even though the FELA preempts state law within its domain, *Janelle v. Seaboard Coast Line R.R.*, 524 F.2d 1259, 1261 (5th Cir. 1975), so that a railroad worker who has a cause of action under the FELA cannot sue under state tort law instead. As an original matter one might have ascribed the absence of such cases to the fact that the FELA as it is written creates liability only for negligence, see 45 U.S.C. § 51, and most of the tort cases brought by railroad workers in which a defense based on the Railway Labor Act is raised have charged wrongful

discharge or intentional infliction of emotional distress, which are both intentional torts. Yet the FELA has been interpreted to reach at least some intentional torts. See, e.g., *Jamison v. Encarnacion*, 281 U.S. 635, 641, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930); *Civil v. Waterman S.S. Corp.*, 217 F.2d 94, 98 (2d Cir. 1954); *Besta v. Consolidated Rail Corp.*, 580 F.Supp. 869 (S.D.N.Y. 1984). Although *Civil* was a case under the Jones Act, which is a statute for the protection of seamen and other maritime workers, rather than under the FELA, the Jones Act incorporates by reference the FELA's standard of liability. See 46 U.S.C. § 688(a).

Granted, interpreting the FELA to reach intentional torts does some violence to the structure as well as the language of the statute. The statute's main purpose was to eliminate a number of traditional defenses to tort liability: contributory negligence, contractual waiver of liability, the fellow-servant rule, assumption of risk. See 45 U.S.C. §§ 51, 53-55; H.R.Rep. No. 1386, 60th Cong., 1st Sess. (1908); S.Rep. No. 460, 60th Cong., 1st Sess. (1908); S.Rep. No. 661, 76th Cong., 1st Sess. (1939). All are defenses to negligence, not intentional wrongdoing. Nevertheless the applicability of the FELA to (at least some) intentional torts is too well settled to be questioned any longer.

The reason why the question whether the Railway Labor Act supplants any part of the Federal Employers' Liability Act tends not to arise may be the following: the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact—an act such as telling a man he's fired, which is precisely the type of act for which the Railway Labor Act provides a swift and adequate remedy. See *Beanland v. Chicago, Rock Island & Pac. R.R.*, 480 F.2d 109, 113 (8th Cir. 1973); *Fullerton v. Monongahela Connecting R.R.*, 242 F.Supp. 622, 626 (W.D.Pa. 1965), and the *Forgione* line of cases, dis-

cussed below; and cf. *Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 931-32 (3d Cir. 1984); *Sharkey v. Penn Central Transport Co.*, 493 F.2d 685, 688 (2d Cir. 1974). Although *Yawn v. Southern Ry.*, 591 F.2d 312 (5th Cir. 1979), points the other way, we find its analysis unpersuasive. Clerical employees claimed to have suffered physical and mental strain because the railroad had not given them enough help for them to be able to do their jobs adequately. In holding that the railroad's conduct might be actionable under the FELA, the court pointed out correctly that a railroad worker who incurs physical or mental injury from unsafe working conditions has an FELA claim. See 591 F.2d at 317. But the complaint was not that working conditions were unsafe; it was that clerical employees had been given too much—not too dangerous—work to do. That is not our idea of an FELA claim; it has nothing to do with the security of the person from physical invasions or menaces.

In any event, we can find no intentional tort cases under the FELA where the physical dimension was lacking. See Annot., *Liability Under Federal Employers' Liability Act for Intentional Tort*, 8 A.L.R.3d 442 (1966). (*Yawn* did not involve an intentional tort.) It is true that *Slaughter v. Atlantic Coast Line R.R.*, 302 F.2d 912 (D.C.Cir. 1962), allowed a suit under the FELA for false arrest. But limiting a person's freedom of movement by arrest or imprisonment is a form of physical interference, and firing a person is not. Moreover, *Forgione v. United States*, 202 F.2d 249, 252 and n. 5 (3d Cir. 1953) (per curiam), holds, contrary to *Slaughter*, that false arrest and false imprisonment are not actionable under the Jones Act, and the only other FELA decisions we have found follow *Forgione* rather than *Slaughter*. See *McSorley v. Consolidated Rail Corp.*, 581 F.Supp. 642, 644-45 (S.D.N.Y. 1984); *Brady v. Penn Central Transport. Co.*, 406 F.Supp. 1239, 1241 (S.D.N.Y. 1975).

Although the question of where to draw the line between the Railway Labor Act and the Federal Employers' Liability Act is distinct from that of the scope of preemption of state tort law by the Railway Labor Act, the two questions should be decided consistently. They involve the same underlying issue: whether the defendant's misconduct, although tortious, is the sort of conduct that Congress, if it had thought about the matter, would have wanted to channel through the grievance machinery set up by the Railway Labor Act; or instead the sort of conduct that Congress would have wanted to leave, concurrently or exclusively, to state or federal tort remedies. The FELA plaintiff has the option of bringing his suit in state court, 45 U.S.C. § 56, and if he does the defendant cannot remove it to federal court, 28 U.S.C. § 1445 (a). For this and other reasons the line between a tort suit under the FELA and a tort suit under state law is not in practice a sharp one, with two exceptions: (1) the FELA eliminates certain defenses that defendants might still have under the laws of some (but a decreasing number) of states, (2) the FELA has been judicially interpreted as we shall see to allow a plaintiff to prevail with minimal proof of negligence.

Unfortunately the line between a tort actionable in court and an employment dispute actionable only in a grievance and arbitration proceeding is also not sharp, except in the extreme cases, and let us begin with them. Suppose that supervisor Boyd accidentally dropped a brick on Lancaster's foot and broke it. Lancaster unquestionably could bring a tort suit under the FELA against the Norfolk and Western for the resulting injury and it would make no difference whether the injury was purely physical or included a mental element as well; the defendant's conduct that gave rise to the injury would involve an unauthorized touching of Lancaster's person and would thus be within the bounds of the statute. And there would be no possible issue of the meaning or appli-

cation of the collective bargaining agreement between the railroad and Lancaster's union, hence no reason to insist that he invoke the arbitral remedies of the Railway Labor Act.

The business of arbitrators, commercial or labor, is to interpret contracts. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184-87 (7th Cir. 1985); *Jones Dairy Farm v. Local No. P-1236, United Food Workers*, 760 F.2d 173 (7th Cir. 1985). This is as true of arbitration under the Railway Labor Act as under the Taft-Hartley Act or the United States Arbitration Act. See, e.g., *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, *supra*, 768 F.2d at 921. Granted, the Railway Labor Act defines the arbitrators' domain as employment disputes "growing out of grievances or out of the interpretation or application of [collective bargaining] agreements," 45 U.S.C. § 153 First (i) (emphasis added), which seems to say that more than contract interpretation is covered. But this language is merely redundant. A "grievance" is a claim of violation of the collective bargaining agreement. Congress had no intention of making a grievance a separate basis for arbitration from disputes over the interpretation or application of the collective bargaining contract. It is true that a dictum in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1289, 89 L.Ed. 1886 (1945) (on rehearing, 327 U.S. 661, 66 S.Ct. 721, 90 L.Ed. 928 (1946)), distinguishes between grievances and contract disputes and gives as an example of claims that are founded on "an omitted case" (i.e., omitted from the collective bargaining agreement), and hence are grievances, "claims on account of personal injuries." But later cases make clear that a grievance is a dispute over rights created by the collective bargaining agreement. See, e.g., *Brotherhood of Railroad Trainmen v. Chicago*

River & Indiana R.R., supra, 353 U.S. at 33, 77 S.Ct. at 636; *Chicago & Northwestern Transport. Co. v. United Transportation Union*, 656 F.2d 274, 278 (7th Cir.1981); *Atchison, Topeka & Santa Fe Ry. v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir.1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1059 (7th Cir. 1983) (dissenting opinion). The Supreme Court has not repeated the dictum of the *Burley* case. If that dictum were an accurate statement of the law, the Railway Labor Act would have repealed the FELA, and all personal injury claims by railroad workers against their employers would be within the exclusive jurisdiction of the arbitration tribunals set up under the Railway Labor Act—something no one believes.

At the other extreme, suppose Lancaster were claiming that he had not been paid the wage fixed in the collective bargaining agreement. This would be an issue of contract interpretation, hence one for the arbitrators. It would not matter that Lancaster described the underpayment as conversion of some other tort; Congress would have wanted the dispute resolved by the arbitrators and not by a state or federal court. See, e.g., *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1168-69 (4th Cir. 1985). But now recurs our earlier point about the scope of the Federal Employers' Liability Act. It would not be necessary in the case we just put to construe the intent of the framers of the Railway Labor Act with regard to the previously enacted Federal Employers' Liability Act. It would be enough to note that there was no possible conflict between the statutes, because the FELA does not reach torts which work their harm through nonphysical means; the only torts it provides a remedy for happen not to come within the scope of the Railway Labor Act.

The difficult cases of preemption involve what we may term "nonphysical" torts. More and more states allow suits for wrongful discharge when a worker is fired for

a reason that is contrary to public policy (such as giving testimony against his employer), and for intentional infliction of emotional distress even when the act that caused the distress was firing the plaintiff. Invariably courts asked to decide whether either type of suit is preempted by the Railway Labor Act hold that it is. See, e.g., *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1048-55 (7th Cir. 1983); *Minehart v. Louisville & Nashville R.R.*, 731 F.2d 342 (6th Cir.1984) (per curiam); *Beers v. Southern Pac. Transport. Co.*, 703 F.2d 425, 428-29 (9th Cir.1983). The courts see such suits, rightly or wrongly, as end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration. But the courts do not state the issue as one of supersession by the Railway Labor Act of the Federal Employers' Liability Act, because no court (probably not even the court in *Yawn*, which apparently conceived the case before it as a simple negligence case about improper working conditions) has thought that any of these new torts arise under the FELA. Even firing a worker in retaliation for bringing an FELA suit against his employer does not violate the FELA. See *Jackson v. Consolidated Rail Corp., supra*, 717 F.2d at 1050-51; *Greenwood v. Atchison, Topeka & Santa Fe Ry.*, 129 F.Supp. 105, 107 (S.D. Cal.1955); see also *Loucks v. Star City Glass Co.*, 551 F.2d 745, 749 (7th Cir.1977); *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771, 775 (7th Cir.1983). If it violates anything, it violates state law.

Our analysis suggests, therefore, that the critical question in this case is simply whether Lancaster has stated a claim under the FELA, which means a claim for violation of one of the traditional "physical" torts, such as assault, battery, and negligent infliction of personal injury, all of which are torts actionable under the Federal Employers' Liability Act. If he has, there is unlikely to be a problem of supersession or partial repeal by the Railway Labor Act.

The incidents that culminated in the pick-ax-handle episode which precipitated Lancaster's psychosis were assault (Lachrone), battery (Funderburk), battery or negligent infliction of personal injury (Boyd), and assault (Tynan). All are conventional torts involving offensive physical contact or, in the case of assault, placing the victim in apprehension of an imminent such contact. True, two of these incidents, the assaults by Lachrone and Tynan—Tynan's assault being the critical incident in the case—arose from an employment dispute, for these supervisors were expressing their dissatisfaction with Lancaster's performance of his job. It might seem, therefore, that at least with respect to these incidents the Railway Labor Act would require a reference to arbitration. Lancaster did complain to his union about the first incident, and though no grievance was pressed, one could have been. The other incidents could also have been grieved: not only the last one, involving Tynan, but the two that seem to have been unrelated to Lancaster's performance of his job. Supervisory misconduct, however motivated, is bound to violate the collective bargaining agreement. So maybe there were remedies under the Act for all the incidents, and maybe those remedies were exclusive.

But as to the latter question, we think not. Arbitrators have no particular competence to determine causality and assess damages in cases of serious personal injury, whether physical or mental. And as no contention is or could be made that inadequate performance would justify an assault on Lancaster (as a matter of fact his performance was adequate, but that is irrelevant), there would be no occasion in proceedings arising out of the incidents to address the merits of the employment dispute that precipitated them and hence no issue of interpretation of the collective bargaining contract—thus making it even clearer that arbitration would have no advantage over adjudication in this case. The collective bargaining

contract was not even placed in evidence. The employment context is wholly incidental.

This case is even stronger for the plaintiff than *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). *Farmer* held that the National Labor Relations Act did not preempt a suit under state tort law by a union official who alleged that the union had subjected him to a campaign of threats, personal abuse, and harassment amounting to intentional infliction of emotional distress. Even though a dispute arises out of a labor dispute and could be made the subject of an unfair labor practice complaint to the National Labor Relations Board, state tort remedies survive provided "that the state tort be either unrelated to employment discrimination [which would have been the unfair labor practice in that case] or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id.* at 305, 97 S.Ct. at 1066 (footnote omitted). Here the labor dispute is even further in the background; Lancaster was not a union activist or official. We cannot see how allowing the suit to go forward could interfere with the objectives of the Railway Labor Act.

The Norfolk and Western argues that the Railway Labor Act has even more preemptive or displacing force than the National Labor Relations Act, and hence that *Farmer* is not necessarily controlling. Some cases do say that the Railway Labor Act occupies the field of labor relations in its domain even more completely than the National Labor Relations Act does in its, as shown by the fact that only the former Act requires that employment disputes be arbitrated. See, e.g., *Jackson v. Consolidated Rail Corp.*, *supra*, 717 F.2d at 1052, *Peterson v. Air Line Pilots Ass'n, Int'l*, *supra*, 759 F.2d at 1169 and n.28. But when courts compare the preemptive scope

of the two statutes in this way they have in mind the provisions of the NLRA that date back to the Wagner Act and create a regulatory scheme administered by the National Labor Relations Board; they are not referring to the entire NLRA, which includes amendments added by the Taft-Hartley Act in 1947 (and by later statutes), notably section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Section 301, which is just as much a part of the edifice created by the (amended) National Labor Relations Act as the parts of the Act enforced by the Labor Board, creates an exclusive federal remedy, judicially rather than administratively enforceable, for breaches of collective bargaining contracts. Where, as is true of more than 90 percent of such contracts, the contract establishes a grievance and arbitration remedy, that remedy becomes by force of section 301 exclusive, just like the arbitral remedies established by the Railway Labor Act. See, e.g., *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). It is therefore hard to see why that Act should have more preemptive force than the National Labor Relations Act. In any event if you read the preemption cases under the Railway Labor Act carefully you will see that none of them is inconsistent with *Farmer*, in all, the elements of outrage are—unlike *Farmer*, or even more clearly this case —incidental to the employment dispute rather than vice versa. See, e.g., *Beers v. Southern Pac. Transport. Co.*, *supra*, 703 F.2d at 426. In none of the cases, moreover, does it appear that the plaintiff had sustained a serious physical or psychiatric injury, for which the remedies (reinstatement, back pay, vacation pay, etc.) normally imposed by arbitrators would be inadequate.

This completes our discussion of the alleged supersession of the Federal Employers' Liability Act by the Railway Labor Act and we move on to the railroad's next contention, which is that the misconduct of the four supervisors, being intentional, cannot be imputed to the

railroad by the doctrine of respondeat superior. To evaluate this argument one must understand the problematic status of the doctrine under the Federal Employers' Liability Act. In an ordinary tort case involving an employee's intentional misconduct, the plaintiff sues the employer for the employee's tort and can recover damages on a theory of respondeat superior if he can show that the employee committed the tort in the course of his employment. Under most definitions of "course of employment" the plaintiff must show that the employee's tort was in attempted (though often misguided) furtherance of the employer's business, as where the employee assaults the plaintiff to collect a debt owed the employer. See Prosser and Keeton on the Law of Torts § 70, at pp. 505-06 (5th ed. 1984). This definition has been adopted in a number of FELA (or—the same thing so far as the standard of liability is concerned—Jones Act) cases. See, e.g., *Lambert v. Morania Oil Tanker Corp.*, 677 F.2d 245 (2d Cir. 1982); *Copeland v. St. Louis-San Francisco Ry.*, 291 F.2d 119, 121 (10th Cir. 1961); *Hoyt v. Thompson*, 174 F.2d 284, 285 (7th Cir. 1949) (per curiam). Although *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 170-72 (2d Cir. 1968) (Friendly, J.), rejects the definition, *Bushey* was not an FELA or Jones Act case. See generally Note, *Respondeat Superior and the Intentional Tort: A Short Discourse on How to Make Assault and Battery a Part of the Job*, 45 U.Cin.L.Rev. 235 (1976).

The peculiarity of the Federal Employers' Liability Act is that it makes the carrier liable for "the negligence of any of the officers, agents, or employees of such carrier," 45 U.S.C. § 51, and there is no suggestion (though it may well be implicit) of any limitation to acts by these persons in furtherance of the carrier's business. If "negligence" in section 51 also means "intentional misconduct," then it can be argued that the carrier is liable for the intentional misconduct of its employees without regard to

traditional limitations on respondeat superior. This reasoning, however, is mechanical, would impart a quite unintended twist to a statute whose begetters were not thinking about intentional torts, and, most important, rests on a misunderstanding of the purpose behind the choice of words in section 51. The purpose was to abolish the fellow-servant rule and thus make the railroad liable for the negligence of its employees as well as for "its own" negligence in failing to provide adequate safety appliances and safe working conditions. See H.R. Rep. No. 1386, *supra*, at 1. The idea that section 51 makes the railroad liable for the intentional torts of its employees outside of the scope of their employment was therefore quite properly rejected in the *Copeland* case, cited earlier, though over a vigorous dissent, compare 291 F.2d at 121-22 with *id.* at 122-24 (dissenting opinion), which persuaded the Sixth Circuit in *Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 641-42 (6th Cir. 1974). Neither decision, however, considered the purpose of the statutory language that makes the railroad liable for the negligence of its employees. As we have said, the purpose was not to broaden the doctrine of respondeat superior, least of all in intentional tort cases; it was to eliminate the fellow-servant rule. Consistently with *Copeland*, most cases (such as the *Jamison* and *Slaughter* cases cited earlier) assume that the employer's liability for his employee's intentional torts is to be determined in FELA cases by the usual principles of respondeat superior. See also *Brooks v. Washington Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979); *Sowards v. Chesapeake & Ohio Ry.*, 580 F.2d 713, 715 (4th Cir. 1978) (per curiam).

A challenge of an opposite kind—urging not that respondeat superior is too restrictive in FELA cases but that the employer cannot be liable under the FELA unless directly at fault—can be mounted from language in several cases that, read literally, makes the employer liable for an employee's tort only if the employer was

negligent in hiring, supervising, or failing to fire the intentional wrongdoer. See, e.g., *Harrison v. Missouri Pac. R.R.*, 372 U.S. 248, 249, 83 S.Ct. 690, 9 L.Ed.2d 711 (1963) (per curiam) (" 'reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence,' " quoting *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 117, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1963)); *Green v. River Terminal Ry.*, 763 F.2d 805, 808-09 (6th Cir. 1985) (same quotation). Such "direct negligence" by the employer—negligent hiring or retention of an incompetent employee—is a traditional basis for making an employer liable for his employee's tort (see Prosser and Keeton, *supra*, § 33, at p. 203 and n.1) and a basis that is independent of respondeat superior. But surely the cases we have cited do not really intend to make it the only basis. See, e.g., *Brooks v. Washington Terminal Co.*, *supra*, 593 F.2d at 1288; *Sowards v. Chesapeake & Ohio Ry.*, *supra*, 580 F.2d at 715. Otherwise the plaintiff in an FELA case would have fewer rights than an ordinary tort plaintiff, an unacceptable result once the statutory reference to negligence is understood to embrace intentional misconduct. In neither *Harrison* nor *Green*, moreover, could the plaintiff have won on the basis of respondeat superior, for in neither case was there a plausible argument that the employee-assailant was acting for the employer. Cf. *Palmer v. Apex Marine Corp.*, 510 F. Supp. 72, 74 (W.D. Wash. 1981). The plaintiff had to prove negligence by the employer and it was in this context that the courts said that proof of negligence is essential in an FELA case.

We conclude—and it is as far as we need go to decide this case—that an FELA plaintiff may prevail in an intentional tort case by showing either that the intentional tort was committed in furtherance of the employer's objectives or that the employer was negligent in hiring, supervising, or failing to fire the employee. Under the second branch of liability, the principle that limits the

employer's liability to torts committed in furtherance of his business drops out. *Brooks v. Washington Terminal Co., supra*, 593 F.2d at 1288; *Slaughter v. Atlantic Coast Line R.R., supra*, 302 F.2d at 916 n.7 (dictum). There is, it is true, a contrary intimation in Justice Holmes's opinion for the Supreme Court in *Davis v. Green*, 260 U.S. 349, 351-52, 43 S.Ct. 123, 124, 67 L.Ed. 299 (1922): "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States." This appears to be a dictum. The Mississippi Supreme Court, so far as one can tell from a rather murky opinion, had decided the case on a theory not of direct negligence but of respondeat superior, treating the employer's knowledge of the vicious disposition of the tortfeasing employee as merely a factor in aggravation of the employer's liability, see *Hines v. Green*, 125 Miss. 476, 493-97, 87 So. 649, 651-52 (1921); and Justice Holmes's opinion goes on to hold that the railroad was not liable under respondeat superior, precisely because the employee was not acting in furtherance of his employer's business, see 260 U.S. at 352, 43 S.Ct. at 124, a matter on which Justice Holmes disagreed with the Mississippi Supreme Court's finding that the employee "was acting within the scope of his employment and with a view to his master's business," and that "it was no private quarrel, but was a quarrel about the master's business," 125 Miss. at 494, 87 So. at 651.

With a speed unusual even for Justice Holmes, the opinion in *Davis* was issued only six days after the case had been argued, and it seems that the great man tripped

in his haste, offering a casual and incorrect observation about direct negligence in a case about respondeat superior. In an opinion he wrote five years later, Justice Holmes described *Davis* as a case about respondeat superior, and implied that direct negligence could be established even if the employee's act was not in furtherance of the employer's business. See *Atlantic Coast Line R.R. v. Southwell*, 275 U.S. 64, 48 S.Ct. 25, 72 L.Ed. 157 (1927). None of the Supreme Court's subsequent opinions in direct-negligence cases, such as *Harrison v. Missouri Pac. R.R., supra*, suggest that there must be proof that the employee's act was done in furtherance of the employer's business, and as noted earlier the facts in *Harrison* refuted any inference that it had been. Although a few lower-court decisions have held that liability in direct negligence does require such proof, see, e.g., *Sheaf v. Minneapolis, St. P. & S.S.M.R. Co.*, 162 F.2d 110, 113 (8th Cir. 1947), none is recent; and cases to the contrary are more numerous and better reasoned. Besides *Brooks* and *Slaughter*, see e.g., *Tatham v. Wabash R. Co.*, 412 Ill. 568, 107 N.E.2d 735 (1952) (Schaefer, J.); *Sowards v. Chesapeake & O. Ry., supra*, 580 F.2d at 715.

There would be no point in having a doctrine of direct negligence if it differed from respondeat superior only in requiring that the plaintiff prove the defendant's negligence; it would never be invoked. And although one might be able to mount an attack on the direct-negligence doctrine from first principles, noting that it casts on the employer the unusual duty (in common law thinking) of having to protect its employees against violence emanating from persons who are not (at the time) engaged on the employer's business, no such attack is attempted in this case. It comes in any event much too late in the evolution of the case law under the Federal Employers' Liability Act, and it ignores the fact that, quite apart from the FELA, the strict rule of the common law that

there is no tort duty to act the "good Samaritan" has long been relaxed in cases where an employee became ill while working, though his illness was not the employer's fault. See, e.g., *Carey v. Davis*, 190 Ia. 720, 180 N.W. 889 (1921); Prosser and Keeton, *supra*, § 56, at p. 383.

Coming back to the particulars of this case, we find the railroad's liability on the basis of respondeat superior to be plain with regard to Lachrone and Tynan, both of whom assaulted Lancaster out of exasperation with Lancaster's performance of his job. If a supervisor pursues his official duties with an excess of zeal, the employer is liable for the torts resulting from that excess; they are in furtherance of the employer's goals. Such an inference could also be drawn regarding Boyd if, as Lancaster thought, Boyd was trying to hit him with the sledgehammer. Of course if as is far more likely (for Lancaster testified that he had no problems with Boyd before the incident) Boyd was merely careless, the railroad's liability would be even plainer.

The issue of respondeat superior is more difficult with regard to Funderburk, whose "goosing" of Lancaster was not related to Funderburk's supervisory duties; it was the pure expression of perversion, infantilism, bad taste, or some combination of these things. The usual view, as we saw earlier, is that when the motive for the employee's intentional tort is personal—which is to say unrelated to his employer's objectives and therefore not in furtherance of those objectives—the employer is not liable under a theory of respondeat superior. But the case also went to the jury on the alternative theory to respondeat superior that the railroad was negligent in failing to prevent its employees from committing a series of intentional torts against Lancaster ("direct negligence"), and, as shown earlier, liability for direct negligence does not require proof that the employee was acting in furtherance of his employer's objectives. It does require, of course, proof of the railroad's negligence. Lancaster had to show that

the railroad should have known that its supervisors were misbehaving, more concretely, that the railroad had information about their propensities, and failed to act on the information.

But there is an obvious difficulty with speaking of "the railroad" in this connection. A corporation is not a human being; "its" knowledge is the knowledge of particular employees. The question is therefore what level of employee need be informed to make the corporation liable (and whether an employee at that level knew of the supervisors' propensities in this case). Oddly, we can find little in the tort cases or commentary on this question, maybe because "direct negligence" is important only in those cases, which apparently are rare, where an employee commits a tort not in furtherance of his employer's business; in any other case respondeat superior provides a simpler route to establishing the employer's liability.

There is some authority for treating any supervisory employee as a responsible agent of the corporation, see *Merrick v. Missouri-Kan-Tex. R. Co.*, 141 Kan. 591, 42 P.2d 950 (1935); *Claris v. Oregon Short Line R. Co.*, 56 Idaho 169, 51 P.2d 217 (1935) (both, by the way, FELA cases), which would cook the railroad's goose in this case. In any event, although surprisingly the parties put in no evidence on the number of employees in the locomotive shop, we do know that the shop is a single building managed by a "master mechanic," and the railroad appears to concede that if the master mechanic knew of these supervisors' propensities to misbehave, the railroad is liable. The record contains no direct evidence on this point— Lancaster in effect having asked the jury to infer from the number of incidents, which especially in the case of Funderburk were not limited to the incidents with Lancaster, that the master mechanic must have known of the problem and should have taken steps to curb the supervisors. But the plaintiff in an FELA

case can get to the jury with even slight evidence of negligence. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957); *Heater v. Chesapeake & Ohio Ry.*, 497 F.2d 1243, 1246-47 (7th Cir.1974); *Mendoza v. Southern Pac. Transport. Co.*, 733 F.2d 631, 632-33 (9th Cir.1984). There was enough evidence of a pattern of supervisory abuse to allow a rational jury to infer that a reasonably careful railroad management, represented in the locomotive shop by the master mechanic, would have gotten wind of it and done something to stop it. No more was required to satisfy the undemanding requirements for proving negligence under the Act.

All that really matters, moreover, is that Tynan's misconduct be attributable to the railroad, as is easily done under a thoroughly conventional interpretation of respondeat superior. It was he (the jury could have found) who pushed Lancaster over the edge. That Lancaster may have been made especially susceptible to such misconduct by earlier acts for which the railroad might or might not be liable would be no defense. Under the "thin skull," or more colorfully the "eggshell skull," rule, the railroad would be fully liable for the consequences of Tynan's assault. See, e.g., *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891); *Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir.1983).

The railroad's next argument is that all the incidents but the one with Tynan, which occurred in 1979, were barred from consideration by the FELA's three-year statute of limitations. 45 U.S.C. § 56. A cause of action in tort arises when the victim is first injured, not when the injury reaches its maximum severity. See, e.g., *Nivens v. Signal Oil & Gas Co.*, 520 F.2d 1019, 1024, modified on other grounds, 523 F.2d 182 (5th Cir.1975). As early as 1977, following the Funderburk incident, Lancaster experienced definite symptoms of mental illness—most notably in the form of a hallucination in which he

thought he saw a bug-like creature, almost a foot long, that had humanoid hands, feet, and face. He was diagnosed at that time as suffering from anxiety, which is a genuine, though generally mild, psychiatric ailment. (The diganosis was odd, though; anxiety does not produce hallucinations.) Therefore, the railroad argues, Lancaster should have brought suit by 1980 (not 1982) if he wanted to complain about the Lachrone, Funderburk, and Boyd incidents.

The principle that the statute of limitations begins to run when injury first occurs has usually been applied to physical injuries. A man falls and breaks his hip. The break heals. Years later he develops crippling arthritis in the hip joint, and he wants to sue the person who caused the fall. The principle that sensibly bars suit in such a case is problematic when applied to a mental illness. The early symptoms of mental illness frequently are equivocal. Most people have occasional feelings of depression, anxiety, and suspicion that could be signs of mental illness but usually are not. Hostile acts by other persons are quite likely to trigger such feelings in thoroughly normal people. It would be absurd to have a limitations doctrine that sent these people running to court to file tort suits within three years of minor incidents on the off-chance that their feelings of distress might have been a precursor of serious mental illness. It appears that Lancaster was not even told by his doctors till after the incident with Tynan that he was suffering from an actual mental illness.

It is not the law that if you are scratched as a result of someone's negligence or other tort you must sue, even though the scratch is trivial, against the possibility that it might develop into something serious after the period of limitations has run. "Presumably there is room for a *de minimis* concept where there has been tortious impact but such inconsequential manifestations that a reasonable person would not consider he was either injured or that

it was appropriate to make inquiry." *Nivens v. Signal Oil & Gas Co., supra*, 520 F.2d at 1024. This must be even truer of symptoms of mental unease.

There is the further point that people who are mentally ill may not be thinking very straight about their mental state or their legal rights. Lancaster's humanoidal bug would have placed a reasonable man on notice that he had a serious mental problem. But does a reasonable man hallucinate? Mental incompetence is a common ground for tolling the statute of limitations, and has been used in at least one FELA case. See *Brooks v. Southern Pac. Co.*, 105 Ariz. 442, 466 P.2d 736 (1970). But Lancaster did not raise this point in the district court, or argue it in his briefs in this court; the point is waived.

We are well aware that many cases hold that the three-year statute of limitations in the Federal Employers' Liability Act begins to run "upon the occurrence of the injury, regardless of whether the full extent of the disability is known at that time." *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 906 (8th Cir.1980). "The mere fact that the extent of the damage was not immediately manifest did not postpone the accrual of the cause of action." *Brassard v. Boston & Maine, R.R.*, 240 F.2d 138, 141 (1st Cir.1957). Yet the same cases make clear, following *Urie v. Thompson*, 337 U.S. 163, 169-71, 69 S.Ct. 1018, 1024-25, 93 L.Ed. 1282 (1949), that in cases of occupational disease, such as silicosis, the statute of limitations does not begin to run till the victim should have discovered the condition. Cf. *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984). The reason for this rule suggests that it cannot be limited to occupational diseases. See *Illinois Central Gulf R.R. v. Boardman*, 431 So.2d 1126, 1128-29 (Miss.1983). When the "onset is insidious," *Young v. Clinchfield R.R.*, 288 F.2d 499, 502 (4th Cir.1961), the victim is not put on notice of his legal rights by the first symptom. This is as true of schizophrenia as of silicosis when as in this case the

onset of schizophrenia is insidious and the early symptoms ambiguous.

In any event, any error in applying the statute of limitations in this case was harmless. Suppose the jury had been instructed that the only tortious conduct that it could consider was Tynan's assault in 1979, which clearly was not time-barred. The expert witnesses seem agreed that it was that assault which triggered the schizophrenia on which Lancaster's entire claim of damages rests. The fact that the railroad had weakened Lancaster by earlier misconduct for which it could not be held liable would be irrelevant to its liability for Tynan's assault and to the amount of damages it would have to pay. The tortfeasor takes his victim as he finds him (emphatically so if the victim's weakened condition is due to earlier, albeit time-barred, torts of the same tortfeasor); that is the egg-shell-skull rule. The single act of Tynan made the railroad fully liable for all the damages that Lancaster sought and the jury awarded.

No doubt if the railroad could have kept the earlier incidents from the jury it would have been in a better litigating posture. But there was little chance of that even if the statute of limitations barred liability for the previous incidents. Lancaster would have been able to introduce evidence of those incidents in order to help explain why Tynan's assault, a fairly minor incident in itself, had the effect it had on him and in order to strengthen his argument for the railroad's direct negligence. Cf. *Burns v. Penn Central Co.*, 519 F.2d 512, 514-15 (2d Cir.1975); *Hartel v. Long Island R.R.*, 476 F.2d 462, 464 (2d Cir. 1973); *Brooks v. Washington Terminal Co., supra*, 593 F.2d at 1289-90; *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697, 700 (3d Cir.1970). It would matter little from a practical standpoint whether evidence about them came in with or without a limiting instruction.

We need not consider whether evidence of those incidents might have been admissible on the alternative theory that if the last act in a series of tortious acts that can fairly be described as a continuing violation of the plaintiff's rights is within the statutory period for suit, claims based on the prior acts are not time-barred, the purpose being to avoid multiple suits. See, e.g., *Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir. 1983).

The last issue relates to the judge's refusal to instruct the jury to reduce Lancaster's damages by the probability that he would have become schizophrenic even if the railroad's supervisors had not misbehaved. Lancaster points out that since the tortfeasor takes his victims as he finds him, if the victim is highly vulnerable that is the tortfeasor's bad luck; there is no discount to average damages. This is a thoroughly sensible principle, by the way. If a tortfeasor never had to pay more than the average victim's damages, victims as a class would be systematically undercompensated and tortfeasors as a class therefore systematically underdeterred, because victims with above-average injuries would get their damages cut down while victims with below-average injuries would not get an offsetting increase.

But a corollary to this principle is that the damages of the "eggshell skull" victim must be reduced to reflect the likelihood that he would have been injured anyway, from a nonliable cause, even if the defendant had not injured him. See, e.g., *Stoleson v. United States*, *supra*, 708 F.2d at 1223-24; *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 173-74 (2d Cir.1970) (Friendly, J.)—the latter a case like this of traumatic schizophrenia. The purpose of this corollary is transparent in a case like *Dillon v. Twin State Gas & Elec. Co.*, 85 N.H. 449, 163 A. 111 (1932). The estate of Dillon, who was electrocuted by the defendant's negligence on his way down from the bridge he had just jumped off, was allowed to get damages only for the short time Dillon would have lived had

it not been for the defendant's negligence. But the principle also applies to cases such as this where the tort victim is highly vulnerable to injury and the damages he suffered must therefore be discounted (multiplied) by the probability, distinctly less than one, that but for the tort he would have lived a normal life.

It is desirable in such cases to direct the jury's attention to the issue by a specific instruction. But the failure to give such an instruction in this case was not reversible error. The judge's instruction on damages was sufficiently general to allow (though it did not compel, as it should have done) the jury to adjust damages downward for the probability that something other than tortious misconduct would have triggered Lancaster's latent schizophrenia; for he told the jury simply that they should award Lancaster the damages proximately caused by the alleged wrongdoing if they found the railroad liable. In its closing argument the railroad reminded the jurors of the psychologist's testimony that, had it not been for the alleged wrongdoing, something else in Lancaster's life would have set him off. Lancaster's counsel argued the contrary evidence of his expert witnesses but did not suggest that it would be improper for the jury to apportion damages according to the probability that Lancaster would have gone through the rest of his life without incident if he had not been victimized by the railroad. The jury was thus at least apprised of the issue.

More important, the railroad failed to offer a specific instruction. In a civil case it is not enough for a party, especially a sophisticated litigant like the Norfolk and Western Railway, merely to point out a subtle omission in the instructions and leave it to the plaintiff and the district judge to figure out as best they can how to repair it. A failure to offer a correct instruction normally will excuse the trial judge's giving an incorrect alternative, *Chase v. Consolidated Foods Corp.*, 744 F.2d 566,

570 (7th Cir. 1984), and the same principle should apply to the failure to offer any instruction. Furthermore, the defendant put in no evidence that would have enabled the jury to make a sensible apportionment of damages between the defendant's conduct and the normal vicissitudes of life that would have confronted Lancaster, and might have precipitated his madness, even if his supervisors had behaved. The instruction that the defendant requested, even if given, would thus have left the jury up in the air. It is the defendant's own fault that the jury was allowed to bring in a verdict that, given Lancaster's preexisting vulnerability to psychosis, may seem high.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Docket Number 82-3149

Chief Judge J. Waldo Ackerman

GARY C. LANCASTER

v.

NORFOLK AND WESTERN RAILWAY COMPANY

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the Plaintiff, GARY C. LANCASTER and against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY according to the following:

Total amount of damages suffered by the Plaintiff as a result of the occurrence in question is $850,000.00, which is itemized as follows:

The disability resulting from the injury: $100,000.00.

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries: $100,000.00.

The reasonable expense of necessary medical care, treatment and services received and the present cash value of the reasonable expenses of medical care, treatment and service reasonably certain to be received in the future: $40,000.00.

The value of time, earnings, profits and salaries lost and the present cash value of the time, earnings, profits and salaries reasonably certain to be lost in the future: $610,000.00.

Date 1/31/84

/s/ Robert J. Kauffman
ROBERT J. KAUFFMAN
Clerk

/s/ Pamela E. Robinson
PAMELA E. ROBINSON
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 82-3149

GARY C. LANCASTER,
Plaintiff,

vs

NORFOLK & WESTERN RAILWAY COMPANY,
A Virginia Corporation,
Defendant.

[Filed Oct. 16, 1984]

ORDER

THIS CAUSE COMING on to be heard before the Honorable J. Waldo Ackerman upon the Motion and Memorandum of the Defendant, Norfolk and Western Railway Company, Requesting Post-Trial Relief; the Objection and Memorandum by the Plaintiff, Gary C. Lancaster, to the Motion of the Defendant Requesting Post-Trial Relief; the Motion of the Plaintiff to Add an Additional Party Defendant; the Response and Memorandum of the Defendant in Opposition to the Motion of the Plaintiff to Add an Additional Party Defendant and the Supplement to the Motion of the Defendant Requesting Post-Trial Relief. The issues have been heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED:

A. That Defendant's Motion for a Judgment in its favor Notwithstanding the Verdict is denied;

B. That Defendant's Motion for a New Trial is denied;

C. That Defendant's Motion for an Amendment of the Judgment by Remittitur is denied;

D. That Plaintiff's Motion to Add an Additional Party Defendant is denied;

ENTERED September 18, 1984.

WRITTEN ORDER EXECUTED this 14 day of October, 1984.

/s/ J. Waldo Ackerman
HONORABLE J. WALDO ACKERMAN
United States District Judge

APPROVED AS TO FORM:

JAMES P. BAKER, Defendant's Attorney

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 18, 1985

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. RICHARD A. POSNER, *Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

No. 84-2768

GARY C. LANCASTER,
Plaintiff-Appellee,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 82 C 3149—J. Waldo Ackerman, *Judge*

ORDER

On October 15, 1985, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issue raised in the Petition for Certiorari is properly before this Court?

2. Whether the facts in this case give rise to a traditional claim under the Federal Employers' Liability Act, 45 *U.S.C.* § 51, hereinfafter called "FELA", and therefore, do not raise the issue presented in the Petition for Writ of Certiorari?

3. Whether an employee who is assaulted and battered as a result of the negligence of the railway is prevented from receiving the award the jury determined compensated him for his injuries pursuant to the FELA simply because the assaults and batteries were perpetrated by supervisory personnel of the railway?

4. Whether the proper inquiry to determine if the Plaintiff has stated a cause of action under the FELA is to determine if the Plaintiff has stated a claim for "negligence" as that term is defined in the FELA?

5. Whether, under the argument advanced by the Petitioner, the Railway Labor Act, 45 *U.S.C.* § 151, hereinafter called "RLA", is needlessly brought into conflict with the Seventh Amendment to the Constitution of the United States of America?

IN THE ALTERNATIVE

6. Whether, assuming the RLA applies to this case, *Lancaster* falls within the *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) exception to the exclusive remedy requirements of the RLA?

PARTIES

Respondent, Gary C. Lancaster, is an individual Citizen of the United States of America. Respondent is hereinafter referred to as "Lancaster".

Petitioner, Norfolk and Western Railway Company, a Virginia Corporation, is a subsidiary of the Norfolk Southern Railway Company. Lancaster is uninformed of the Petitioner's related interests, if any, that may be required to be disclosed pursuant to Rule 28.1. Petitioner is hereinafter referred to as "N & W".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1702

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary C. Lancaster, Respondent, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit requesting that the petition be denied.

OPINIONS BELOW

The petition adequately sets forth the opinions of the lower courts in its Appendix. Reference to the opinions below in this brief shall be to the appropriate page of the Appendix contained in the petition and designed as "App. ___".

JURISDICTION

The petition adequately sets forth the jurisdictional grounds of this Court.

CONSTITUTION

The Seventh Amendment to the Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES

The petition adequately states the pertinent provisions of the RLA, 45 U.S.C. §§151(a) and 152.

The petition adequately states section 1 of the FELA, 45 *U.S.C.* §51.

Section 5 of the FELA, 45 *U.S.C.* §55 states in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§51, et.seq.], shall to that extent be void: . . .

STATEMENT

1. AT TRIAL, THE FOLLOWING FACTS WERE INTRODUCED INTO EVIDENCE:

Gary C. Lancaster, age 39 at trial, began working for the N & W in 1967. Prior to being employed by the N & W, Lancaster had acquired considerable mechanical and welding skills. Lancaster enjoyed his work at the N & W and was a friendly out-going person who performed his work well and participated in employee recreational activities. He was an average, normal worker, husband and father of two minor children [R.3B, pp.3-26; R.2, pp.273,337,338; R.1, pp.97,133,146].

In 1975 Lancaster was working in the railroad's locomotive shop in Decatur, Illinois. Lachrone, a short-tempered foreman in the shop who had once been disciplined for roughing up a worker, became angry at Lancaster and several other workers who Lachrone thought were soldiering on the job. After flipping over a table on which one of the workers (not Lancaster) was sleeping, and smashing a bench, Lachrone grabbed a broom handle, approached Lancaster in a menacing fashion, screamed at him for about 15 seconds, and shook the broomstick in his face. Lancaster bid out from Lachrone's supervision and complained about the incident to his union, but no action was taken [App. 2a].

The incident upset Lancaster abnormally. He thought people were following him, thought his phone was tapped, felt that the pressures of working for the railroad were too much, and went to Georgia to look for a new job, but after a couple of months his distress subsided and he went back to the N & W. He was assigned to another foreman, Funderburk, who liked to "goose" workers, pull their hair, and hit them on their arms. He also did these things to Lancaster, over Lancaster's protest. This behavior culminated in an incident in 1976 when Funderburk twice stuck his hand down the back of Lancaster's pants—once squeezing a buttock, the other time sticking his finger into Lancaster's anus. Lancaster became very upset, thereafter had trouble working, lost control of his emotions, consulted a doctor, and on the doctor's advice took a leave of absence.

The doctor diagnosed Lancaster as suffering from anxiety [R.3B, pp.59-62; App.2a].

Lancaster returned to work early in 1977 and worked uneventfully until an incident in 1979 involving another supervisor, Boyd. Lancaster and another worker were repairing a locomotive under Boyd's supervision when Boyd picked up a sledgehammer—though as a supervisor he was not supposed to wield a sledgehammer, and he did not have on safety gloves which are required to prevent greasy sledgehammers from slipping from a worker's hands—and swung it at a pin that was stuck. The sledgehammer flew out of Boyd's hands when he completed his swing, and struck Lancaster. Although only bruised, Lancaster became very upset because he thought Boyd had thrown the sledgehammer at him ("I swear before God the man throwed that sledgehammer, because when he throwed it, it went right where my head was back, and when I moved back is the only thing that saved my life") [R.3B, p.p.68; R.2, pp.285-289 and 294-296; App.2a,3a].

After the incident with Boyd, Lancaster developed a fear of sharp objects, of tools and many other things. He avoided his family and friends and had urges to hurt himself [R.3B, pp.73,74,83].

Two months later Lancaster found himself working under another hot-tempered supervisor, like Lachrone—Tynan, a burly six-footer, who while fondling a pickax handle told Lancaster that if he didn't "keep on the job and do it right, I'll put your name on it." About a week later Lancaster happened to deliver some papers to Tynan that were folded. Tynan said, "I told you not to fold the papers," to which Lancaster replied that he had not folded them, they had been folded when he had received them to give to Tynan. Tynan, enraged, charged Lancaster with pickax handle in hand ("I turned around, and here's Jack [Tynan] coming at me, and I says, don't Jack, don't") and struck the door frame over Lancaster's head with the han-

dle ("I heard his pickax handle hit the door frame, and I turned around, and there's Jack, and he wasn't smiling"). Lancaster became even more upset than after the previous incidents. Indeed his mental condition deteriorated rapidly [App.3a].

Lancaster saw things that were not real. He was confused, in an internal rage, screaming, could not control his emotions or do anything properly and was unable to explain how he felt [R.3B, pp.79-85]. His doctor referred him to a psychiatrist who, two weeks after the incident with Tynan, diagnosed Lancaster as schizophrenic [App.3a].

Except for treatments, Lancaster did not go outside his house after July 5, 1979. Lancaster went from window to window looking out to see if anyone was watching him. Lancaster was scared of everyone, including his friends and neighbors. He stayed in an internal rage. He was unable to do any tasks in the home. He stayed awake all night watching out the windows. He slept on the couch briefly during the day. Lancaster was clumsy and uncoordinated. His hands did not follow what his mind wanted to do. He had to stop and pre-plan his every move, and he still was not able to move correctly. Lancaster had thoughts of hurting himself and his friends. Lancaster was verbally and physically abusive to his wife and children, would not communicate or talk to strangers, and fell into a deep depression. He was no longer able to drive because he felt that he would injure himself or someone else. Lancaster could not reason out problems or do mechanical tasks. He exhibited absurd behavior, was unpredictable, without warning became violent, depressed and suicidal. Lancaster was not the same person he was before the incident with Tynan [R.3B, pp.84,86,87,89-103; R.2, pp.343-353].

Schizophrenia is a psychosis and is a general classification for the most serious debilitating mental illness. The schizophrenic's personality becomes so disorganized that

he becomes unable to function in an effective way in everyday life. The schizophrenic loses his ability to interpret reality and the events around him. He has gross distortions of the perceptual process and hears and sees things that are, in fact, not there. The schizophrenic has a difficult time in the thought process and finds it difficult to maintain a rational train of thought, jumping from subject to subject. Schizophrenia can cause serious disruptions in the person's affect. For example, a schizophrenic may show no emotion in a situation which would normally cause a strong emotional response while he may show a strong emotional response to a situation that should not cause an emotional reaction. A schizophrenic may also show an inappropriate emotional response such as laughter at a sad event, or crying and depression at a joyous event [R.2, pp.187,189; R.4, pp.616-618].

Doctor Henebry, a pyschiatrist, diagnosed Lancaster as suffering from schizophrenia, a schizo-affective type which means a type of schizophrenia with emphasis on thought disorder and includes a major affective component, or serious mood disorder. Doctor Henebry testified that Lancaster's illness is not curable, and that he will never be able to work at the N & W or in any other employment. Doctor Henebry testified that Lancaster will require medical supervision for the rest of his life; that Lancaster has permanent mental pain and suffering from his illness; that Lancaster needs medication for the rest of his life; and, even with medication, Lancaster could not return to work [R.3C, pp.443-439].

Doctor Sunderland, a psychiatrist, testified that in addition to chronic schizophrenia, Lancaster suffers from paranoia and aggraphobia, both of which are related to Lancaster's schizophrenia. He said paranoia is extreme suspiciousness where a person feels other people are out to harm, poison, kill or somehow get him. Aggraphobia is the fear of open places which limits a person to wherever he lives and usually manifests itself by his being afraid to

go out of his house [R.2,pp.181-184,190-192]. Doctor Sunderland testified that Lancaster's illness has periods of deterioration and periods when it is better. He said, however, Lancaster will never be cured and will never be able to work. Doctor Sunderland testified that Lancaster suffers mental pain and anguish from his illness and that Lancaster will require medical supervision and medication for the rest of his life. He said that Lancaster's medication has side effects which range from a dry mouth to severe neurological symptoms such as a twisted neck, thick tongue, the inability to swallow, muscle contractions and tremors and can cause shock sufficient to kill him. He said that the medication helps only to a certain degree and never provides a very good remission for chronic schizophrenia [R.2, pp.199-202 and 229-232].

Doctor Harrison, a psychologist, testified he diagnosed Lancaster as suffering from schizophrenic disorders, undifferentiated type, chronic with acute exacerbation with strong paranoid and affective features [R.4, p.613]. Doctor Harrison testified that when a person suffers the severe problems that Lancaster has it is not unusual for him to be reluctant or afraid to take medication he needs. For Lancaster, this fear of medication is a real complication. It is not uncommon for a schizophrenic to have to be hospitalized during the more florid phase of the disease [R.4, pp.634,670-672,675]. Doctor Harrison testified that Lancaster would not act violently towards his bosses or supervisors because he is too afraid of them. From time to time Lancaster will act out his hostilities on his loved ones, his wife and children [R.4, pp.677,678].

All three expert witnesses agreed that the incident with Tynan, coming on top of the earlier incidents, had precipitated a descent into madness from which Lancaster will never recover [App.4a].

2. THE PETITIONER'S "STATEMENT", 2., PAGE 6 OF THE PETITION ADEQUATELY RELATES THE PRO-

CEDURAL HISTORY OF THIS CASE IN THE TRIAL COURT.

3. THE PETITIONER'S "STATEMENT", 3., PAGE 7, MISSTATES THE OPINION OF THE COURT OF APPEALS IN SEVERAL CRITICAL AREAS.

In illustrating the line between a tort actionable in court and an employment dispute actionable only in a grievance and arbitration proceeding, the court identified three categories of cases.

The Petitioner properly stated the first category the court of appeals identified as follows:

> The first category includes those cases in which a classic 'unauthorized touching' of plaintiff's person takes place (such as a supervisor negligently dropping a brick on an employee's foot) and in which there is no possible issue concerning the meaning or application of the collective bargaining agreement (App., *infra*, 8a-9a). The court held that claims in this category may plainly be brought under the FELA (*id.*) [Petition pp.6,7].

The Petitioner properly stated the second category the court of appeals identified as follows:

> The second category includes those cases which involve classic labor disputes (such as whether an employee had been paid the wage fixed under the collective bargaining agreement) (App., *infra*, 10a). The court of appeals held that, regardless of how an employee characterizes such a dispute, it is one which 'Congress would have wanted . . . resolved by the arbitrators [under the RLA] and not by a state or federal court [under the FELA]' (*id.*) [Petition p.7].

The Petitioner, however, totally misstated the third category of cases the court of appeals identified [Petition p.7].

The court of appeals identified the third category of cases as follows:

> The difficult cases of preemption involve what we may term 'nonphysical' torts. More and more states allow suits for wrongful discharge when a worker is fired for a reason that is contrary to public policy (such as giving testimony against his employer), and for intentional infliction of emotional distress even when the act that caused the distress was firing the plaintiff. Invariably courts asked to decide whether either type of suit is preempted by the Railway Labor Act hold that it is. [citations omitted]. The courts see such suits, rightly or wrongly, as end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration. But the courts do not state the issue as one of supersession by the Railway Labor Act of the Federal Employers' Liability Act, because no court (probably not even the court in *Yawn*, which apparently conceived the case before it as a simple negligence case about improper working conditions) has thought that any of these new torts arise under the FELA. Even firing a worker in retaliation for bringing an FELA suit against his employer does not violate the FELA. [Citations omitted]. If it violates anything, it violates state law. [App.10a,11a].

The court of appeals found that this case fits into the first category of cases, traditional FELA actions for physical torts, and not in the "third" category of cases the Petitioner invented. The court stated:

> The incidents that culminated in the pickax-handle episode which precipitated Lancaster's psychosis were assault (Lachrone), battery (Funderburk), battery or negligent infliction of per-

> sonal injury (Boyd), and assault (Tynan). All are conventional torts involving offensive physical contact or, in the case of assault, placing the victim in apprehension of an imminent such contact. [App.12a].

The Petitioner further misinterprets the opinion of the court of appeals on page 11 of the Petition. The court of appeals did not premise its decision on a theory that Congress did not mean what it said in drafting the RLA, and this court erred in its decision it reached in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711 (1945). The court of appeals did note that this court's dictum in *Burley*, if carried to its logical conclusion, would result in the RLA repealling the FELA. *Burley*, however, was construing the individual worker's rights under the RLA and was not attempting to reconcile the RLA and the FELA. The court of appeals simply found that Congress did not intend to repeal the FELA when it enacted the RLA, and that is the premise upon which the court of appeals based its decision [App.10a].

SUMMARY OF ARGUMENT

The issue stated in the Petition for Writ of Certiorari is not properly before this Court. The collective bargaining agreement (if one existed) was not offered into evidence. This Court has no basis in the record upon which to decide the issue.

Lancaster is a FELA suit based upon traditional FELA torts. It does not raise the issue the Petitioner seeks to bring before this Court. Each of the torts committed by the Defendant, two assaults and two batteries (or one battery and one simple negligent contact) separately, are sufficient basis to state an actionable FELA claim.

Petitioner's argument that an employee injured as a result of being assaulted and battered by reason of the

railway's negligence should be precluded from receiving his award simply and solely because the perpetrators were supervisory personnel of the railway is neither logical nor supported by the case law.

In order to determine whether the RLA or the FELA applies to a set of facts, the test is whether the Plaintiff can state a claim under the FELA. In order to state a claim under the FELA, an injury causing event must be a result of "negligence" as defined in FELA.

The Petitioner's argument needlessly brings the RLA into conflict with the Seventh Amendment by eliminating the injured employee's right to a trial by jury in the traditional common law torts encompassed in the FELA.

IN THE ALTERNATIVE,

Assuming the RLA applies to the *Lancaster* case, the facts are so "outrageous" that they come under the *Farmer v. Brotherhood of Carpenters and Joiners, Local 25, infra*, exception to the exclusive remedy requirements of the RLA.

This case arises premised upon well-settled legal principals properly applied by the district court and the court of appeals and there is no issue which need be resolved by this Court. Lancaster requests that the Petition be denied.

REASONS FOR NOT GRANTING THE PETITION

I. The Issue Stated In The Petition For Writ of Certiorari Is Not Properly Before This Court.

Petitioner contends the sole issue before this Court is:

> Whether the court of appeals erred in holding that a claim solely for emotional injuries is actionable under the Federal Employers' Liability

> Act, 45 *U.S.C.* §51, where assault and battery are alleged, but where the alleged sources of the emotional injuries were workplace disputes with supervisors subject to mandatory grievance procedures that had been initiated by the employee pursuant to the Railway Labor Act, 45 U.S.C. §151. [Petition p.(i)].

In support of that stated issue, Petitioner argues outside the record in this cause. The collective bargaining agreement was never offered into evidence at trial. The Petitioner, inventing an agreement, states that there was a collective bargaining agreement signed by a Union representing Lancaster, that the work performed by Lancaster was undertaken in accordance with the terms of that agreement and that conditions of employment for Lancaster are covered by that agreement. Whether such an agreement existed or what its terms and the conditions of employment may have been simply are not of record in this case.[1] The thrust of the Petitioner's argument, however, is that the collective bargaining agreement arguably covers the assaults and batteries committed against Lancaster and, therefore, are subject to the mandatory grievance procedures of the Railroad Labor Act, 45 *U.S.C.* §151. Without the collective bargaining agreement to review, the issue is not properly before this Court. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 (1972). *Miller v. Aviron*, 384 F.2d 319 (D.C.Cir. 1967). Without the collective bargaining agreement in the record, this Court has no basis in the record upon which to determine its effect, if any.

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[1] As shown by the record in this case whether there was a collective bargaining agreement or what its terms and conditions may have been was totally insignificant to Lancaster's FELA claim, and the Petitioner's defense thereof. Neither party introduced such agreement nor relied upon the protection of its terms.

ASSUMING, IN *ARGUENDO*, that this issue is properly before this Court. Lancaster offers the following additional reasons for not granting the Petition for Writ of Certiorari.

II. The Facts In This Case Give Rise To A Traditional FELA Claim and, Therefore, Do Not Raise The Issue Presented In The Petition For Writ of Certiorari.

The facts in this case do not present the issue that the Petitioner seeks to bring before this Court. This case is a traditional FELA action for assault, battery and (as the court of appeals found) simple negligence. All of which are traditional FELA tort theories.

The court of appeals found that it was far more likely that Boyd was merely careless (negligent) when the sledgehammer flew out of his hands striking Lancaster [App.20a]. Boyd was not authorized to use the sledgehammer, and he was not wearing safety gloves which prevent sledgehammers from slipping. There were no disputes between Lancaster and Boyd either prior to or after the sledgehammer struck Lancaster [App.20a; R.3B, pp.63-72]. If the sledgehammer had broken Lancaster's leg, instead of his ability to think logically and rationally, there would be no question that this case was proper under the FELA. There is no theoretical distinction in the responsibility for either type of injury. Absent a dispute concerning rates of pay, rules, or working conditions or out of interpretation or application of agreements covering rates of pay, rules or working conditions, the RLA does not apply. [45 *U.S.C.* §151(a)].

The court of appeals found that "Funderburk's goosing" of Lancaster was not related to Funderburk's supervisory duties; it was the pure expression of perversion, infantilism, bad taste, or a combination of these things [App.20a]. The case went to the jury on the theory "that the railroad was negligent in failing to prevent its employees from committing a series of intentional torts against Lancaster ('direct negligence')" [App.20a]. The Court found that

"There was enough evidence of a pattern of supervisory abuse to allow a rational jury to infer that a reasonably careful railroad management... would have gotten wind of it and done something to stop it" [App.22a]. Indeed, Funderburk's "goosing" activities were disclaimed by the N & W at trial. They do not constitute employer-employee disputes over the interpretation of application of the collective bargaining agreement, the work rules or conditions of employment. The negligence of the N & W did not arise vicariously by any act of Funderburk, but was its own direct negligence. Certainly, the N & W should not be allowed to claim that its own direct negligence was a minor dispute over the interpretation of application of a collective bargaining agreement, work rules or conditions of employment.

The court of appeals found that the incidents with Tynan and Lachrone "arose from an employment dispute, for these supervisors were expressing their dissatisfaction with Lancaster's performance of his job" [App.12a]. However, the court of appeals found that "no contention is or could be made that inadequate performance would justify the assaults on Lancaster" [App.12a]. There would be "no issue of interpretation of the collective bargaining contract" to arbitrate [App.12a]. "The employment context is wholly incidental" [App.13a]. Thus, these incidents are not even "arguably" governed by the RLA.

The Petitioner describes the injuries to Lancaster as "emotional injuries". The injury Lancaster suffered is a schizophrenic thought disorder, which among other things, deprives Lancaster of the ability to think rationally and in a logical manner. Is the breaking of Lancaster's ability to think rationally and in a logical manner different from the breaking of a bone in his leg which prevents its use? There is no question but that the court of appeals was correct when it found "Arbitrators have no particular competence to determine causality and assess damages in cases of serious personal injury, whether physical or mental...

thus making it even clearer that arbitration would have no advantage over adjudication in this case" [App.12a, 13a].

Considered in light of all the facts adduced at trial, this case simply does not raise the issue the Petitioner brings before this Court. Each incident standing alone is sufficient basis for liability of the N & W under the FELA.

III. An Employee Who Is Assaulted And Battered As A Result Of The Negligence Of The Railway Is Not Prevented From Receiving The Jury-Awarded Damages Simply Because The Assaults And Batteries Were Perpetrated By Supervisory Personnel Of The Railway.

It has long been settled by this Court that assaults and batteries contribute actionable negligence under the FELA. *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082 (1930).[2] Indeed the Petitioner does not argue to the contrary. A railroad has been held liable to an injured worker when its negligence causes the worker to be assaulted and battered by a third party, *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947), or by a fellow employee of equal rank, *Besta v. Consolidated Rail Corp.*, 580 F.Supp. 869 (S.D.N.Y. 1984). The railroad has been held liable for a supervisor who assaults and batters a subordinate employee, *Jamison vs. Encarnacion, supra*; *Baker v. Chicago B & O Ry.*, 327 Mo. 986, 39 S.W.2d 535 (1931). Now the Petitioner suggests that since a grievance could be filed by a subordinate employee who is assaulted and battered by his supervisor, the subordinate employee is limited to filing a grievance claim under the RLA. In effect, the railroad argues it would be liable if the worker was assaulted and battered by third persons

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[2] *Jamison v. Encarnacion, supra*, involved an assault and battery by a foreman against his subordinate employee. Comparably this case also involves assaults and batteries by supervisors against a subordinate employee, i.e. Lancaster.

or fellow employees, but that the railroad would be immune for liability if the perpetrators were its own supervisors. The railroad would have its supervisory personnel free to assault and batter its workers and immune from action under the FELA.[3] The injured worker's claim would be restricted by the awards available under the grievance procedure of the RLA to the wages he lost while out of work recovering from the beating [App.14a]. Certainly, there is little common sense in allowing recovery for assaults and batteries perpetrated by those less closely associated with the railroads and not allowing recovery for assaults and batteries perpetrated by those who make up the management of the railroad. Lancaster should not be prevented from receiving the award the jury determined compensated him for his injuries simply because he was unlucky enough to be assaulted and battered by the persons who were to provide order in the workplace, rather than by persons who worked there or by persons who were strangers to it. Petitioner argues for a ridiculous state of the law from an analytically unsound position.

IV. The Plaintiff Has Stated A Cause Of Action Under The FELA If The Plaintiff Has Stated A Claim For "Negligence" As Defined In The FELA.

In support of its petition, the Petitioner argues that the proper analytical approach is to review the RLA, and if you can find a minor grievance nestled somewhere in the facts, then the RLA controls. In support of this approach the Petitioner cites a series of cases in which claims for intentional infliction of emotional distress, retaliatory discharge and wrongful discharge under state law or allegedly under the FELA, have been determined to give way to

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[3] Implicit in the Petitioner's argument is that the reverse is not true. If a supervisor is assaulted and battered by a subordinate employee as a result of the railroad's negligence, the supervisor may still pursue his FELA claim. See *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248, 9 L.Ed. 711, 83 S.Ct. 690 (1963) and *Tatham v. Wabash R.Co.*, 412 Ill. 568, 107 N.E.2d 735 (1952).

the mandatory grievance procedure of the RLA. However, Petitioner fails to observe that in each of the cases cited the principal issue upon which recovery was sought involved interpretation of the collective bargaining agreement. In this case the collective bargaining agreement bears no relationship to the claim presented. It was neither presented nor introduced into evidence at trial [App.13a].

Additionally, this case does not have a minor grievance nestled somewhere in its facts. A minor dispute or grievance involves the interpretation or application of a collective bargaining agreement concerning rates of pay, rules or working conditions. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). Obviously, Lancaster's rate of pay is not involved and neither are the rules governing Lancaster's employment. In order for the Petitioner to argue that the assaults and batteries were minor grievances, the Petitioner must be relying upon the phrase "working conditions" or this Court's dictum in *Elgin, Joliet & Easter R. Co. vs. Burley, supra*, at page 325 U.S. 723, which stated that "disputes" under the RLA include claims "founded upon some incident of the employment relation or asserted one, independent of those covered by the collective agreement, ..." The types of working conditions commonly negotiated in a collective bargaining agreement concern insurance, break time, sick leave, vacation time, number of men required to do a particular job, seniority rights and pension or retirement rights. Generally one does not expect such agreements to explicitly prohibit supervisors from assaulting or battering their employees. The right not to be physically assaulted or battered has a basis independent of the collective bargaining agreement; it is based in our common law and in our criminal laws. Correspondingly, the duty not to assault or batter an employee should not be limited, as the Petitioner proposes, to the working conditions section of a collective bargaining agreement. Additionally, the duty not to assault

or batter an employee should not be limited by this Court's dictum in *Burley* to the "incidents of the employment relationship". To suggest, as the Petitioner does, that the assaulting and battering of Lancaster involves the interpretation or application of the collective bargaining agreement or is an "incident of the employment relation", and, therefore, must be grieved as a minor dispute both violates the Seventh Amendment to the United States Constitution and asks the arbitrators to do the impossible. It asks the arbitrators to do that which they have no experience or expertise [App.12a]. Arbitrators will be asked to decide issues of respondeat superior, direct negligence, causation or proximate causation and to assess damages for personal injuries. Arbitrators will be asked to give awards for pain and suffering, past and future medical expenses and future lost wages, all of which is beyond their power to do [App.14a]. Traditionally these are issues for the Courts to resolve. The Seventh Circuit Court's opinion is that being assaulted and battered by a supervisor is not a minor dispute or grievance within the meaning of the RLA, but rather is properly subject to FELA jurisdiction.

A FELA claim is founded upon the railroad's negligence. Assuming, in *arguendo*, that Lancaster could have filed a grievance under the RLA is of no importance. Under the Petitioner's argument any worker who is injured by the negligence of the railroad could file a grievance based upon the "working conditions" which gave rise to the railroad's negligence. In other words, there is no way to theoretically distinguish a grievance filed by Lancaster as a result of being assaulted and battered by his supervisor with a grievance filed by Lancaster as a result of being injured by a defective rail car. In each case, under the Petitioner's argument, the employee's ability to file a grievance would result in the employee being limited to a RLA claim. In effect, the RLA would repeal the FELA. Certainly, this is a result which Congress did not intend or mandate.

The obvious solution recognized by both the Seventh Circuit in this case and the Ninth Circuit in *Buell v. Atchison, Topeka and Santa Fe Rwy. Co.*, 771 F.2d 1320 (9th Cir. 1985), Petition for Cert. granted No. 85-1140, is to direct the inquiry to the FELA. If the Plaintiff can state a claim based upon the FELA, then he should not be prevented from proceeding on that claim by the RLA. In the analysis of this issue lies the difference between the Seventh Circuit in this case, *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807 (7th Cir. 1985) and the Ninth Circuit in *Buell*.

The Ninth Circuit in *Buell* viewed the issue as one of whether there is any reason under federal law to limit a railroad employee's right to relief under the FELA for emotional injury. Since the Court concluded there was none, they allowed the case to proceed. The Ninth Circuit did not analyze the case in terms of which torts are encompassed within the definition of "negligence" under the FELA, but rather, in terms of which types of injuries are compensable under the FELA.

The Seventh Circuit in *Lancaster* viewed the issue as one of whether the Plaintiff alleged a tort which was compensable as "negligent" under the FELA [App.11a]. The *Lancaster* Court viewed "physical" torts, such as assault, battery, and negligent infliction of personal injuries, as actionable under the FELA. Since *Lancaster* has established all three such torts in his proof at trial, the Seventh Circuit upheld Lancaster's award. The legal theories, torts alleged and the operative facts are so totally different in *Lancaster* from *Buell* that they are not comparable at any level.

In *Buell v. Atchison, Topeka and Santa Fe Rwy. Co.*, *supra*, the United States Court of Appeals for the Ninth District considered the following issue:

> The question before us is therefore not whether a state law claim is preempted by federal law

> but whether there is any reason under the federal law to limit railroad employee's right to relief under the FELA for emotional injury. We conclude that there is none.

In this case, Lancaster's injury was induced by traditional common law torts, i.e. assault and battery. Unlike *Lancaster*, in the *Buell* case those common law torts, i.e. assault and battery, were not the causation factors of Buell's resulting mental illness.

The *Buell* case and the *Lancaster* case are bottomed upon a basic causation difference:

A. *Buell*: Harassment, threats and intimidation;

B. *Lancaster*: Tortious assaults and batteries.

While the Petitioner attempts to equate the two rulings, there is neither a factual or legal basis to equate these cases.

Negligence implies a duty and a breach of that duty. All the cases cited by the Petitioner for retaliatory discharge, wrongful discharge, and intentional infliction of emotional distress involve actions which were not considered negligent at common law. They have been created more recently and, therefore, it does not necessarily follow that they are "negligent" acts within the meaning of the FELA [App.10a,11a]. For example, at common law an employee was dischargeable at will and any reason, or no reason at all, was sufficient for discharge whether the motive be good or bad. Only recently have courts implied a duty to discharge for reasonable cause or at least a cause not violating public policy and, therefore, established the corresponding tort for breach of that duty. Whether such duty arises and its breach amounts to "negligence" under the FELA is for this Court to consider in an appropriate case. The same analysis applies to the other cases cited by the Petitioner.

The Petitioner is wrong when it implies that the Seventh Circuit's opinion in *Lancaster* conflicts with any of the cases it cites. Indeed, *Lancaster* finally gives a rational and logical basis underlying the reconciliation of all the cases the Petitioner cites.

Lancaster has properly proven a claim for "negligence" under the FELA, which is all that is required to affirm his jury award. Taking this case as the Petitioner suggests or holding it pending *Buell* will not advance this Court's resolution of the issue in *Buell*. However, the Petitioner's argument in this case needlessly interjects an issue that this Court need not reach.

V. Under The Argument Advanced By The Petitioner, The RLA Is Needlessly Brought Into Conflict With The Seventh Amendment To The Constitution Of The United States of America.

The Petitioner's argument that the RLA prevents Lancaster's recovery for his FELA claims brings the RLA in direct conflict with the Seventh Amendment to the Constitution of the United States of America, UNITED STATES CONST., amend. VII. The Seventh Amendment guarantees the right of trial by jury in all cases of common law in which the amount claimed is in excess of $20.00.

At common law an employee could maintain an action against his employer based upon his employer's negligence. Therefore, the FELA does not create the employee's cause of action. However, it does promote it by abolishing several restrictive common law defenses, expanding the definition of negligence and lowering the quantum of proof necessary to establish a claim [App.6a]. To the extent that the RLA would prohibit the employee from recovering his common law claims, it must run afoul of the Seventh Amendment because the RLA does not provide the right of a trial by jury. In this case, assault and battery are claims recognizable at common law. The Petitioner argues that in this case the RLA should prevent Lancaster's constitutional

right of a trial by jury. Such argument needlessly conflicts the RLA with the Seventh Amendment. See Mr. Justice Douglas dissenting in *Andrews v. Louisville & Nashville R. R. Company*, *supra*, at 406 U.S. 320.

As Lancaster has demonstrated in Section IV of his Argument, if this Court determines that all that is necessary to reconcile the two statutes is to determine whether the Plaintiff can properly state an FELA claim, then no conflict arises. In other words, are the events ones which this Court has determined constitute "negligence" within the meaning of the FELA? If all the common law torts of negligent infliction of personal injury, assault and battery are allowed to proceed as FELA claims, then the RLA does not conflict with the Seventh Amendment. Additionally, if the FELA does not include within its definition of "negligence" claims for retaliatory discharge, wrongful discharge or intentional infliction of emotional distress, then finding that these claims are properly matters for determination under the RLA does not conflict with the Seventh Amendment. If the employee has no FELA claim, then he is left only with an RLA claim in the federal regulatory scheme Congress provided. The RLA is not taking something from the claimant which he had, but instead is providing him with some measure of relief where he had none. In reconciling the RLA and the FELA so that the RLA does not conflict with the Seventh Amendment, a review of the Congressional Record is important. A diligent search of the Congressional Record when the RLA was enacted has failed to disclose any Congressional discussion or debate concerning employee injuries, claims under the FELA, or the reconciliation of the RLA to the FELA. Plainly, by its silence, Congress did not intend for the RLA to prevent workers from prosecuting their claims for injuries under the FELA.

Congress did express its intent in favor of allowing an injured employee to present its FELA claim when it enacted Section 55 of the FELA. Section 55 states in part:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

Additionally, when construing the RLA, this Court in *Burley* sought to protect the individual worker's rights when it stated at 325 U.S. page 744:

> The collective agreement could not be effective to deprive the employees of their individual rights.

This Court should reconcile the RLA and the FELA by protecting the rights of the individual worker, an intent consistent with both the RLA and the FELA. Reconciliation should be by stating that the RLA does not apply in situations where the workers state a claim for "negligence" as defined by the FELA thereby preserving the individual rights of the workers. So construed, the RLA does not conflict with the Seventh Amendment.

VI. In The Alternative Assuming The RLA Applies To This Case, *Lancaster* Falls Within The *Farmer v. Brotherhood Carpenters & Joiners of America* Exception To The Exclusive Remedy Requirements Of The RLA.

In the event that this Court considers that the RLA applies to this case, then this case comes under the exception to the exclusive remedy requirements of the RLA as set forth in *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

The Seventh Circuit Court, in this case, described Lancaster as follows [App.13a]:

> This case is even stronger for the plaintiff than *Farmer v. United Brotherhood of Carpenters & Join-*

> *ers of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). *Farmer* held that the National Labor Relations Act did not preempt a suit under state tort law by a union official who alleged that the union had subjected him to a campaign of threats, personal abuse, and harassment amounting to intentional infliction of emotional distress. Even though a dispute arises out of a labor dispute and could be made the subject of an unfair labor practice complaint to the National Labor Relations Board, state tort remedies survive provided 'that the state tort be either unrelated to employment discrimination [which would have been the unfair labor practice in that case] or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.' *Id.* at 305, 97 S.Ct. at 1066 (footnote omitted). Here the labor dispute is even further in the background; Lancaster was not a union activist or official. We cannot see how allowing the suit to go forward could interfere with the objectives of the Railway Labor Act.

The Seventh Circuit Court of Appeals found that the Defendant's actions are far more "outrageous" in this case than those of the Defendant in *Farmer* [App.14a]. Under the test in *Farmer*, Lancaster's claim should be allowed to stand even if the RLA applies.

CONCLUSION

For the foregoing reasons, it is obvious that this case does not bring before this Court the issue the Petitioner raises. Both the District Court and the Seventh Circuit Court of Appeals reached a decision based upon well-settled law, and there is no question for resolution by this Court. The Petition should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Since the Petition in this case was filed, the Court has granted the petition in *The Atchison, Topeka and Santa Fe Railway Company* v. *Buell*, No. 85-1140. *Buell*, like this case, raises the issue of the interplay between the Railway Labor Act ("RLA"), 45 U.S.C. § 151, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. More specifically, both cases raise the question whether an employee, who has suffered purely emotional injury as a result of misconduct of his supervisors, may avoid the exclusive mandatory arbitration requirements of the RLA by filing a claim for damages under the FELA.

Although the facts in this case differ from those in *Buell*—Respondent here, unlike *Buell*, has alleged traditional tort claims—this Court's decision in *Buell* may control this case. At a minimum, the principles set forth in the Court's decision should provide useful guidance for the disposition of this case. Therefore, this case should, at the very least, be held pending resolution of *Buell*.

None of Respondent's arguments supports a contrary conclusion.

Respondent's threshold argument is that this case is not properly before this Court because the collective bargaining agreement between Petitioner and Respondent's union was not introduced into evidence in the District Court (Br. Opp. at 11-12). Respondent's argument wholly miscomprehends the source of the duty to submit workplace disputes to the grievance procedures set forth in the RLA. As this Court made clear in *Andrews* v. *Louisville and N.R. Co.*, 406 U.S. 320, 323 (1972), "the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." Thus, Respondent's failure to pursue his claims concerning his supervisors pursuant to the grievance procedures provided under the RLA raises a question concerning the jurisdiction of the District Court—a question which, of course, cannot be waived. *See*, e.g., *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939). Petitioner raised this jurisdictional question both in the District Court and in the Court of Appeals, which addressed the issue at length in its opinion (Pet. App. at 4a-14a).

Respondent's argument that his claims properly arise under the FELA miscomprehends the question presented. The Court of Appeals explicitly found that Respondent's claims could have been resolved under the grievance mechanism provided under the RLA (Pet. App. at 12a). The fact that Respondent's claims might otherwise properly arise under the FELA, absent the prescription of the RLA, is *not* the end of the dispute as Respondent suggests (Br. Opp. at 18; whether "Lancaster could have filed a grievance under the RLA is of no importance"). To the contrary, as discussed in the Petition (at 11-13), Congress, this Court, and the courts of appeals for several circuits have made clear that the scope of the RLA's coverage is broad and where it applies the RLA's remedies are *exclusive*.[1] The decision of the Seventh Circuit

[1] As his last argument, Respondent, citing *Farmer* v. *United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290

here—as well as that of the Ninth Circuit in *Buell*—conflicts with those authorities, and it is precisely this conflict which this Court's decision in *Buell* will address. At a minimum, therefore, the parties and the Seventh Circuit are entitled to the benefit of the Court's decision in *Buell* before this case is finally decided.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case should be granted. Alternatively, the Court should retain this case on its docket pending decision on the merits of No. 85-1140.

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(1977), asserts that even if the RLA applies to this case, the claims here can be brought under the FELA without interfering with the objectives of the RLA. This claim is erroneous because Congress' express purpose in enacting the RLA is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances." 45 U.S. § 151(a)(5). The Court of Appeals' application of the *Farmer* exception in this case is premised on the theory that the preemptive scopes of the RLA and the National Labor Relations Act are the same (Pet. App. at 13a-14a). This premise, however, conflicts with several other decisions. *See Andrews v. Louisville & N.R. Co., supra,* 406 U.S. at 323; *Peterson* v. *Air Line Pilots Ass'n, Int'l,* 759 F.2d 1161, 1169 and n.28 (4th Cir. 1985); *Jackson* v. *Consolidated Rail Corp.,* 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied,* 104 S. St. 1000 (1984).